

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

January 13, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
22.	:	Docket No. CENT 99-62-M
	:	A.C. No. 03-01753-05504
WOLF CREEK SAND & GRAVEL	:	

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1994) (Mine Act). On November 27, 1998, the Commission received from Wolf Creek Sand & Gravel (Wolf Creek) a request to reopen penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. 815(a). It has been administratively determined that the Secretary of Labor does not oppose the motion for relief filed by Wolf Creek.

Under section 105(a) of the Mine Act, an operator has 30 days following receipt of the Secretary of Labor's proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. 815(a).

Wolf Creek's motion consists of a November 6, 1998 letter to the Department of Labor's Mine Safety and Health Administration (MSHA) requesting relief from the final orders. Mot. at 1. Attached to the letter are copies of MSHA's November 18 letter to Wolf Creek denying relief, the proposed assessments, and the citations related to the proposed penalties. In the November 6 letter, Syble Harris asserts that she is an employee of Wolf Creek who is responsible for everything from answering the phone to doing the payroll. *Id.* Harris alleges that Wolf Creek's failure to file a hearing request to contest the proposed penalties for the four alleged

violations was due to the health problems of Ms. Harris's husband. *Id.* She submits that for approximately one month before the November 6 letter to MSHA was written, Ms. Harris and her husband spent Aalot [sic] of time at the hospital having numerous tests made.@ *Id.* As a result, the operator, which assertedly is very small, failed to timely contest the proposed penalties.

We have held that, in appropriate circumstances and pursuant to Fed. R. Civ. P. 60(b), we possess jurisdiction to reopen uncontested assessments that have become final by operation of section 105(a). *See, e.g., Del Rio, Inc.*, 19 FMSHRC 467, 468 (Mar. 1997) (remanding final order when operator inadvertently misfiled hearing request card); *RB Coal Co.*, 17 FMSHRC 1110, 1111 (July 1995) (remanding final order when operator misplaced hearing request card); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Preparation Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In accordance with Rule 60(b)(1), we have previously afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Peabody Coal Co.*, 19 FMSHRC 1613, 1614-15 (Oct. 1997); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996); *General Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996).

On the basis of the present record, we are unable to evaluate the merits of Wolf Creek's position.¹ In the interest of justice, we remand the matter for assignment to a judge to determine whether Wolf Creek has met the criteria for relief under Rule 60(b). If the judge determines that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

¹ In view of the fact that the Secretary does not oppose Wolf Creek's motion to reopen this matter, Commissioner Marks concludes that the motion should be granted.

Distribution

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